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No. 205

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

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HELEN M. KIEFER,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia**

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## REPLY BRIEF TO THE BRIEF OF THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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It is deemed necessary to file this reply brief. The reason being that the brief of the Solicitor General and his subordinates contains half truths and many misleading statements which only have a tendency to confuse this Court.

The true facts in this case are very simple. The insured, George N. Herbert, while in the military service applied for $10,000 National Service Life Insurance. He paid premiums until January, 1946. He applied for reinstatement of only $5000 of insurance on October 3, 1946,

and paid premiums through August, 1947. He again applied for reinstatement of $5000 of the insurance on April 26, 1948, and premiums were deducted from his compensation payments until the date of his death.

Herbert incurred an aggravation of a disability of Asthma while in the service, and he was rated and being paid for 60% disability at the time he last reinstated, and in fact, until the date of his death.

When he applied for reinstatement of insurance in answer to a question he gave his correct C-Number which related to his claim for compensation. The government continued to deduct premiums from his compensation payments for nearly three and one-half years. The date of his death was November 20, 1951.

When he died the Veterans Administration claimed that he had committed fraud because he did not state he had received treatment by government Doctors. The examinations of these physicians were all contained in his C-file to which he had referred in his application for reinstatement. The Court below held that the Veterans Administration did not have to take notice of their own files, and this despite the fact that the premiums which the insured was paying were deducted from the compensation payments, evidence of which could only be clearly ascertained by resort to the compensation folder.

On page 2 and 3 of the Respondent's brief there is quoted a portion of the regulations of the Veterans Administration covering reinstatement of National Service Life Insurance policies. The counsel for the respondent has not printed the regulations in full they left out and curtailed the provisions of the regulations relating to persons applying for reinstatement in the same class as Herbert who was suffering from a service incurred disability. The following was left out:

"3401. DEFINITION OF GOOD HEALTH

(A) the words "good health", when used in connection with insurance, mean that the applicant is, from clinical or other evidence, free from disease, injury, abnormality, infirmity, or residual of disease or injury to a degree that would tend to weaken or impair the normal functions of the mind or body or to shorten life.

(B) The existence of "good health" shall not be denied in connection with any application for reinstatement of insurance, or for new insurance if such application is submitted prior to January 1, 1950, and if the disability or disabilities, less than total in degree, resulted from or were aggravated by active military or naval service between October 9, 1940, and September 2, 1945, both dates inclusive. (3401—August 1, 1946)

Reinstatement of the $5000 insurance policy Herbert applied for was entitled to be granted on the following statutory authority:

Title 38 U.S.C.

Section 802(c)(2) provides, among other things, that:

"* * * any individual who has had active service between October 8, 1940, and September 2, 1945, both dates inclusive, shall be granted such insurance upon application therefore in writing and upon payment or authorization for deduction of premiums and evidence satisfactory to the Administrator showing such person to be in good health at the time of such application. In any case in which application for life or disability insurance or for reinstatement of such insurance is made prior to January 1, 1950, the Administrator shall not deny, for the purposes of this Section or Sections 803-805, 806-818 of this title, that the applicant is in good health because of any disability or disabilities, less than total in degree, resulting from or aggravated by such active service. * * *". (Emphasis supplied)

From the foregoing this Court will note that even though Herbert had a 60% disability from Asthma he was entitled to reinstate his insurance any time before January 1, 1950. This was true even though the disability of Asthma had been of a much more severe degree from the date of the lapse of the insurance in August, 1947. He still could have reinstated at the time that he did because at no time was he ever rated totally disabled by the Veterans Administration for compensation purposes. So in considering this case, the disability of Asthma must be ruled out.

The contents and findings of the examinations made by Government Doctors which were contained in his C-file were never disclosed to him.

Dr. Carl L. Eckhardt (A.21) was one of the government physicians who examined him. He was one of the witnesses upon whom the government relied to prove fraud in the reinstatement. This Doctor examined him on February 10-20, 1948. (A.52) He testified, in part, as follows:

(A.23) "Q. From this report as you read it, sir, and considering your normal style of making reports of this nature at the time, could you say whether the veteran, at the time of this examination, was a relatively sick man or not? A. He was, from the standpoint of bronchial asthma.

"Q. Could you say whether he was a substantially sick man from the point of view of any other diagnosis other than bronchial asthma? A. No.

(A.24) "Q. What I am particularly interested in finding out is: Considering the patient's general objective physical condition being one of a person who has come in with a complaint, now can you say whether the basis of this man's awareness that he is not well was that basis primarily in the asthma or was it substantially caused by the nephritis and hypertension? A. It was by the asthma.

"Q. Did the nephritis and hypertension have any relation to his awareness of being sick, so to speak? A. I don't think so.

"Q. This is your conclusion here, I take it, and it is based upon the report which is in front of you? A. Right.

(A.25) "Q. Assuming that the condition of enlargement of the liver and nephritis had been of recent origin at the time of this examination and had not appeared previously in Herbert's records or on previous examinations prior to a year before this examination, can you comment on whether the patient was or must have been obviously aware that he had something else wrong with him besides bronchial asthma? A. From the findings that were obtained when this patient was examined, it is very probable that he may not have been aware of his other conditions.

"Q. Could he be aware, though? A. Had he been told by other medical personnel.

"Q. At the conclusion of this examination and of the findings and of the making of this report which is Government Exhibit 3, was it normal practice to give the veteran examined any of the information found? A. No.

(A.26) "Q. Was this information kept for the use of the Veterans Administration only? A. The information was kept for the use of the Veterans Administration only.

"Q. Was the veteran in any way advised as to his condition? A. No.

"Q. What action would be taken if the veteran had been found to be a sick man in some way or other? A. The veteran would have applied for treatment.

"Q. Let us assume that the veteran had some condition which he is not clearly aware of but which medical advice would determine that he should be treated for, what would be done in a case like that? A. Insofar as the Veterans Administration was concerned?

"Q. Yes. Assuming, of course, that the Veterans Administration policy at the time or regulations prevented you from disclosing to the veteran the exact diagnosis? A. The veteran wouldn't be advised to have definitive treatment.

"Q. The veteran would, under all circumstances, have to apply for treatment? A. Yes.

"Q. Or he would have to come in with complaints; is that correct? A. That's correct.

"Q. What could you tell me, if you know, ordinarily impelled veterans to come in and take examinations such as this? By that I mean, was it their own complaints or someone else, or were they asked to come in? A. This type of an examination is given because the veteran is usually drawing a compensation, and the Veterans Administration calls the veteran in for this examination.

"Q. In other words, this examination was not made on the veterans own complaint? A. That's right.

"Q. Or because of his own complaints. A. No.

The above testimony shows that while the veteran may have been suffering from other disabilities than Asthma, he would not know it.

Much is made in the brief about a notation to the effect that Herbert had been drinking a quart of liquor a day. This notation was on one of the medical reports. However, the correctness of this statement is challenged by a statement on a report of medical examination made two months prior thereto where the notation is made that the patient, Herbert, uses "No alcoholic beverages". (A.70)

The question of fraud in this case must be sustained upon the premise that Herbert knew that he was suffering from other diseases than Asthma. There is not a single iota of evidence in the record which shows that he k[illegible] he had other diseases at the time he applied for reinst[illegible] ment. The results of the examinations made by the go[illegible] ernment physicians were never disclosed to him. He pointed to the very file in which the medical reports were contained. Does this fact look like an "intent to defraud"? Furthermore, because he was suffering from a service incurred aggravated disability he had a right to reinstatement of his entire $10,000 and if he had any intent to defraud he would have applied for the full amount of the insurance. He furthermore would not have requested his

premiums to be deducted from his compensation payments. This fact alone shows no intent to defraud. All of these facts were overlooked by the Court of Appeals below.

Counsel for the Respondents cite a great many cases in their brief. If this Court has the time to read such cases, you will conclude that none of them are in point except the case of *Pence* v. *United States*, *316 U.S. 332* which is clearly in favor of the petitioner. Despite the confusion by the misstatements and half-truths contained in the respondent's brief when the facts are fully ascertained and applied to the evidence in this case, the conclusion must be reached that no evidence at all was introduced to show that there was an "intent to defraud".

The conclusion in the respondent's brief to the effect that the evidence offered by the government covered "intent to defraud", as required by the case of *Pence* v. *United States*, *supra*, is not sustained by any proof. The evidence is all to the contrary.

Unless this Court desires to overrule its decision in the case of *Pence* v. *United States*, this Court in its supervisory powers should grant the application for the writ of certiorari.

Respectfully submitted,

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